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Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

CASE NO:

GEORGE V. SMITH,
Petitioner

vs,

ORANGE COUNTY PUBLIC SCHOOLS, ET AL,
Appellees.

Circuit Court No:
06-16624-DD
District Court No:
6:04-CV-1811-ORL-28

PETITION FOR WRIT OF CERTIORARI

GEORGE V. SMITH, Petitioner, Pro-Se
713 Calabria Drive
Altamonte Springs, FL 32714
TELEPHONE (407) 774-0354

Questions Presented for Review

STATEMENT 1

Defendant filed a motion for summary judgment at the end of the period allotted for discovery. The supporting documentation clearly showed that Plaintiff and the EEOC had been lied to about Plaintiff having been terminated, but was instead illegally and arbitrarily "resigned" by the school board. The document had been sought through public records request, sub poena duces tecum, and request for production. Defendant resisted all legal attempts for Plaintiff to see the document prior to the motion for summary judgment. The arbitrary resigning of Black employees was one of many activities designed by the school board to artificially keep the number of Blacks within the lower range of guidelines acceptable in the Desegregation Order under which defendant operated. Small numbers of Blacks were removed under various plans so as to be undetected by the Justice department. Defendant was permitted to violate all discovery rules. In support of the motion for summary judgment, Defendant presented an affidavit that on its face was contradicted by the attached evidence.

QUESTION 1

Whether – the court below "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power", and contrary to the decision below but consistent with the decisions of this Supreme Court and decisions previously from the appealed district Court– the Constitution Right to Due Process requires Pro Se Plaintiff must

be allowed discovery and amendments according to the Rules and under Rule 56 be given either a hearing date or a date certain at least 10 days prior to the district court taking a motion for summary judgment under advisement and therein granting the motion.

STATEMENT 2

Plaintiff Pro-Se was forced to dismiss his attorney six months into the proceeding. The attorney had never served a notice of appearance nor filed any papers in the proceedings. The court issued an order stating that Plaintiff could only have an attorney to represent him in total. Plaintiff Pro-Se located 3 civil rights attorneys that stated they were too busy to handle the case, but would assist Plaintiff Pro-Se with discovery matters as long as Plaintiff Pro-Se agreed to have them represent Plaintiff Pro-Se before the court only for trial and immediate activities related to the trial. Plaintiff Pro-Se filed a motion seeking permission for this intermittent representation and the lower Court denied the motion.

QUESTION 2

Whether -- contrary to the decision below but consistent with the decisions of previous Supreme Court decisions and Federal Rules of Civil Procedure – Pro Se Plaintiff in a Racial Discrimination suit can be allowed intermittent representation as assistance with discovery.

STATEMENT 3

Plaintiff Pro-Se was denied discovery requests by the district court through magistrate orders. Neither in the Case Management Order nor on the form for magistrate orders was there any notification that Pro Se Plaintiff would waive the Due Process right to appeal lower court orders unless he objected to the presiding Judge himself within 10 days. In the absence of such a statement, Plaintiff Pro-Se believed the Rule referred only to defects, e.g.: wordings confusing, ambiguous, or completely left out, which confused the meaning of the order.

QUESTION 3

Whether – the court below "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the lower court, as to call for an exercise of this Court's supervisory power", and contrary to the decision below but consistent with the decisions of this Supreme Court and decisions previously from the appealed district Court– the Constitution Right to Due Process – can Pro-Se Plaintiff in a Racial Discrimination suit appeal magistrate discovery orders which show no defect, but are perceived by Pro-Se Plaintiff as being wrong.

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IX. Appendix

A. Page viii. - Authorities in Alphabetical Order

B. Page ix - .Lower Orders in Entirety

I. CITATION OF ORDERS

Order granting summary judgment. 11/21/06

Order entering judgment. 11/24/06

Opinions in Affirmation of Court of appeals. 06/04/07

1. Appellant waived his right to appeal orders denying discovery with Plaintiff having been denied all material discovery by the district court.

2. Appellant's request for leave to amend prior to summary judgment was untimely and properly denied.

3. Appellant was not entitled to a notice of a date certain for taking Summary Judgment under advisement.

4. Affirmation without opinion of the district court's denial of Plaintiff's request to use intermittent counsel.

Denial of Petition for Rehearing. 07/23/07

II. JURISDICTION

The **United States Court Supreme Court** has jurisdiction over the actions of lower court judges and the 11th Circuit Court of Appeals. The Re-Hearing was denied on July 23, 2007 and this petition is timely filed with this Supreme Court by mail on October 22, 2007.

The **United States Court of Appeals Eleventh Circuit** has jurisdiction over the actions of lower court judges in the middle Florida district.

The Constitutional Considerations this Court is being asked to consider are only those of representation and due process.

III. Authorities in Alphabetical Order

Ackerman v. Lauver
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Johnson v. Zerbst
304 U. S. 458 (1938)..... 9, 10

Jones & Laughlin Steel
750 F.2d 1214 (1984)..... 9

Levald, Inc. v. City of Palm Desert
998 F.2d 680..... 3

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734 F.2d 762, 765 (1984)..... 7

Miranda v. Arizona,
384 U. S. 436, at 475..... 10

Peterson v. John Hancock Mut. Life Ins. Co.
143 F.2d 869 (1944)..... 6

Palko v. Connecticut,
302 U. S. 319, 325..... 11

Powell v. Alabama,
287 U. S. 45, 68, 69..... 9

Sartor v Arkansas Natural Gas Corporation
321 U. S. 724, at 728 and 129..... 5

STATEMENT OF CASE

Appellant was hired by Orange County Public Schools in August of 2000. Thirty days on the job Plaintiff was told he was being terminated without cause and without reason. Plaintiff was told by written memo that this was authorized by statute. Requests to an assistant superintendent and the school board chairman received no statement of reason for the termination.

Appellant, who is Black and at the time 52 years of age, filed a complaint with the EEOC. Orange County Public Schools responded to the EEOC by saying that Appellant was fired for causes which did not exist in September of 2007. Although the statute referenced by Orange County Public Schools stated that this termination must be "without cause," the EEOC ruled that Orange County Public Schools had the right by statute to terminate and refused to investigate farther.

Since the statute defines termination without cause, such as hiring too many teachers, there exists no statute barring the rehiring. Moreover, a reading of the policies show that Orange

County Public Schools has refused to create a policy to incorporate the referenced statute but has made policy that terminations can only be done "with cause." Appellant, therefore, a qualified Math instructor in an area that complains publicly that it has difficulty in finding Math instructors, applied for a teaching position.

Defendant refused without reason given to hire Appellant. Defendant has hired both Black and White employees who were genuinely terminated without cause by other counties. Defendant has hired employees who were terminated for cause from other counties where the cause did not deal with moral turpitude.

Appellant filed a complaint in 2003 with the EEOC for retaliation. Orange County Public Schools responded with the identical response as in 2000. The EEOC granted a right to sue with no ruling. Appellant filed a complaint with the district court in 2004 Pro-Se, close to the last moment as his retained

counsel had not done so. Appellant incurred many problems with counsel that must remain privileged. However, Appellant was forced to dismiss the attorney who at the time had filed no papers nor represented Appellant before the court in any manner. The attorney sought permission from the court to leave and in granting permission the court instructed Appellant that should he hire another attorney, he could not proceed pro-se.

TEXT OF PETITION

QUESTION 1

Plaintiff Pro-Se was made aware only with the service of the motion for summary judgment that Defendant had never voted to terminate him as required by statute and its incorporated policy thereto. Instead, Orange County Public Schools only voted to accept a resignation that had never been tendered. Upon receipt of the document, Plaintiff Pro-Se, attempted to amend his complaint with the new found information. In the affirmation, the appeal court ventured far

from the precedents of Ackerman v. Lauver, 242 N.W. 2d 342, and Levald, Inc. v. City of Palm Desert, 998 F.2d 680. Levald on page 691 [23] specifically states: "...the outright refusal to grant the leave...is an abuse of that discretion and inconsistent with the spirit of Federal Rules." The purpose of the rule for allowing amended complaints is that Plaintiffs may amend for violations to the law found before the trial.

In the instant case Plaintiff did not know the actual nature of his termination having been attributed to a "voluntary resignation". This was revealed in an attachment to the motion for summary judgment which had been sought through previous and resisted discovery. Plaintiff having only one bite at the apple must be allowed to amend his complaint. The sworn affidavit attached to the motion for summary judgment falsely swears that the attached document showed that plaintiff had been terminated and that he was refused hiring because of the termination. Plaintiff's name therein does not appear among the terminations. Plaintiff's name only appears as a resignation,

where plaintiff never resigned nor offered any resignation. It is plaintiff's position that this procedure of "arbitrarily resigning" Black employees is a calculated procedure to reduce the number of Black employees without allowing due process as required by a termination, and to escape notice by the supervisory Court of Discrimination against Black employees since the number in this act alone is relatively small. The Defendant is under a consent agreement to not practice Racial Discrimination.

Plaintiff's assertion that this information was hidden until the delivery of the motion for summary judgment should have been accepted as good cause for amendment or the court should have conducted a hearing to see if the information had been truly hidden and whether plaintiff had acted with due diligence to discover the information. Instead, the lower court just assumed that the information had been readily available to plaintiff and refused to allow the amendment. **This is an abuse of discretion.** In the absence of a hearing, plaintiff's statement that the information was hidden until the delivery of the motion

for summary judgment was good and sufficient cause to freely allow the amendment. Dussouy v. Gulf Coast Inv. Corp. 660 F.2d at 597- 598 states: "56 *evinces a bias in favor of granting leave to amend. The policy of the federal rules is to permit liberal amendment to facilitate determination of claims on the merits and to prevent litigation from becoming a technical exercise in the fine points of pleading.*"

The appealed court showed a disinterest in the appeal. It stated that it took a de novo view of the motion for summary judgment. However, it refused to acknowledge the contradiction between the sworn affidavit that Plaintiff had been terminated and the attached official record of separation as a resignation. This is a matter material to determine whether Plaintiff was discriminated against. Where there is a conflict in material facts, the jury must decide. Likewise the affidavit states, "It is my personal policy..." This raises the question as to whether an officer for a state agency can act on his own "personal policy" rather than the policy approved by the agency. Again that is a

matter for the jury. Sartor v Arkansas Natural Gas Corporation 321 U. S. 724, at 728 and 729 requires that the facts be quite clear.

Had Plaintiff been delivered a 10-day notice, plaintiff would have sought a continuance until defendant complied with the court's order compelling production. Plaintiff could have then produced a proper response with supporting documents that had the correct foundation laid. Likewise, in a proper response plaintiff could have pointed out the impropriety in both the affidavit and supporting documents, which on the face do not meet the standards of Peterson v. John Hancock Mut. Life Ins. Co. 143 F.2d 869 (1944).

Rule 56 requires a date certain and not only allows plaintiff to supply his response before that date, but to ask for a continuation, and to request hearings on other pertinent information before that date. The rule is clear in that it wishes parties to have ample opportunity to prepare a proper response. As in Milburn v United States, 734 F.2d 762, 765 (1984), which

was remanded by this appealed from court, "The record in this case nowhere indicates that ..." Plaintiff was "...given a 10-day notice...that the court **would** take the government's motion under advisement as of a **certain date**." The appealed court maintains that the objected to case management report specifies a time period with terms such as "unless," "could," and "may." No where is there a statement that on November 15, 2006 or any other certain date, the court shall take the motion for summary judgment filed in this case under advisement."

Griffith v Wainwright, 772 F.2d 822, 825, 826 **again remanded by this appealed court**, is more precise and specific. Griffith states: "...that an adverse party must be given express, ten-day notice of the summary judgment rules... **and of the consequences of default**." "As in such cases, as in that before us today, '**a court should be particularly careful to ensure proper notice to a pro se litigant**...so that any rights that such a litigant might have will not be extinguished merely through failure to appreciate the subtleties of modern motion practice." "We think

it clear from the inadequacies of Appellant's responses that he was not given notice proper under Rule 56(c)." The same appealed court previously ruled in Herron v. Beck 693 F.2d 125 (1982), remanded, "Moreover, a court should be particularly careful to ensure proper notice to a *pro se* litigant. In addition, the ... notice must be sufficiently clear to be understood by a *pro se* litigant and calculated to apprise him of what is required under Rule 56." In the instant case, 2 days prior to the granting of the motion Plaintiff filed a motion to compel previous ordered to be produced documents.

The appealed court in affirmation sanctioned the lower court's acceptance of responses to discovery requests explicitly prohibited in: Sieb's Hatcheries v. Lindley 13 FRD 113, Dulansky v. Iowa-Illinois 92 F.Supp 118, and many other discovery rulings noted in the appeal. The sheer volume of denied discovery and paucity of permitted discovery calls for the supervisory power of this court.

QUESTION 2

The fact that due process requires representation is not of question. The precedent currently applied to Racial Discrimination cases is Jones v. Jones & Laughlin Steel 750 F.2d 1214 (1984). In Jones the 3rd circuit court of appeals stated that not only did plaintiff have a right to hire an attorney, but also to amend his complaint, and **seek additional time for discovery with the assistance of his attorney.**

In affirming the denial of representation, the appealed court ignored Mr. Justice Black on 463 of Johnson v. Zerbst 304 U. S. 458 (1938) stated: "The '...right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the scien e of law. (Powell v. Alabama, 287 U. S. 45, 68, 69) He requires the guiding hand of counsel at every step in the proceedings against him.'..." In the instant case, the lower court has denied Appellant counsel and

then the appealed court has stated that he "waived" rights by not taking actions of which counsel would have apprised him.

QUESTION 3

The right to appeal is a constitutional right. This court must be mindful that plaintiff was denied all material discovery by the magistrate. The attempt by the appeal Court to designate the magistrate as a court lower to district court is absurd. The rule states that defects must be addressed within 10 days. That is to prevent the defect from being argued at a time when it can not be corrected. A ruling by a magistrate clear in its decision and requiring no action cannot be defective. It is a ruling of the Court. The appealed court stated that Plaintiff "waived" his due process right to an appeal. The appeal Court has declined to review discovery orders stating that Appellant "waived" his right to a review. This United States Supreme Court has always disagreed with this position. In Miranda v. Arizona, 384 U. S. 436, at 475, Mr. Chief Justice Warren States: "This Court has

always set high standards for the waiver of constitutional rights, Johnson v. Zerbst, 304 U. S. 458 (1938)..."

In Johnson, Mr. Justice Black stated of the Sixth Amendment, and, no less can be said of the other Amendments, "...stands as a constant admonition that if the constitutional safeguards it provide be lost, justice will not "still be done." He references Palko v. Connecticut, 302 U. S. 319, 325. He then states, on 464 of Johnson: "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' **A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.**"

Summary

While this court cannot investigate whether defendant actually is intentionally lowering the number of employees by Race, Petitioner should be allowed to properly discover evidence and

present his case before a jury. Petitioner has been denied due process in violation of the discovery rules, rule 56 and precedents, by being denied the assistance of an attorney that would appear intermittingly, by not having discovery precedents applied on his behalf, and by not having compliance by either courts below with Rule 56 or the circuit court's own precedence of providing an express 10 day notice with an ***identifiable date certain*** prior to granting summary judgment as required by rule and precedents. The rule clearly provides for Plaintiff to have requested a continuance to enforce the Court's Production Order and have this information to respond to the motion.

The sheer volume of denied application of precedents in this case calls for the supervisory power of this court. Plaintiff Pro-Se received not one ruling that agreed with the precedents by either courts of appeal or this Supreme Court. There remains nowhere else Petitioner can go to acquire a fair trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been delivered by U. S. Mail on the 21st day of March 2008, to the Firm of Rumberger, Kirk & Caldwell, P.A., 300 S. Orange Avenue, Suite 1400, Orlando, Fl 32801 and to Judge David Baker at the George C. Young US Courthouse 80 N. Hughey Avenue, Orlando, FL 32801-2278.

George V. Smith

George V. Smith

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this petition complies with the typing Rule for the United States Supreme Court. The Text of the petition contains 13 pages which includes 2,127 words.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 21, 2008.

George V. Smith

George V. Smith

James ACKERMAN d/b/a Iowa Missouri Construction Company, Plaintiff,
v.
P.M. LAUVER d/b/a Lauver DX Service, Appellee,
v.
IOWA MUTUAL INSURANCE COMPANY, Appellant.
No. 2-57645.
Supreme Court of Iowa

May 19, 1976

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1. Pleading-29
Amendments are the rule and denials the exception. 58 I.C.A. Rules of Civil Procedure, rule 88.

2. Pleading-236 (1)
Trial court has considerable discretion in allowing amendments. 58 I.C.A. Rules of Civil Procedure, rule 88.

3. Pleading-236 (2,4)
Amendments may be allowed at any time before the case is finally decided, even after completion of the evidence; but they should not be allowed after a responsive pleading has been filed, if they substantially change the issues. 58 I.C.A. Rules of Civil Procedure, rule 88.

[1,2] We first decide the issue raised by Lauver's late amendment. Amendments are the rule and denials the exception. The trial court has considerable discretion in allowing amendments. Rule 88, Rules of Civil Procedure; Atlantic Veneer Corp. v. Sears, 232 N.W. 2d 499,503, (Iowa 1974); Mora v. Savereid, 222 N.W.2d 417, 422 (Iowa 1974).

[3] Amendments may be allowed at any time before the case is finally decided, even after completion of the evidence; but they should not be allowed under Rule 88 after a responsive pleading has been filed, if they substantially change the issues. Atlantic Veneer Corp. v. Sears, supra, 232 N.W. 2d at 503; Smith v. Village Enterprises, Inc., 208 N.W. 2d 35,37-38 (Iowa 1973). The amendment belatedly asserted against Iowa Mutual by way of cross-petition the same claim for damages, both actual and exemplary, which Lauver had earlier made in his counterclaim against Ackerman.

DULASKY v. IOWA ILLINOIS GAS & ELECTRIC CO.

92 F. Supp. 118.....page 8

DULANSKY et al v. IOWA-ILLINOIS GAS & ELECTRIC CO.
Civ. No. 1-15.

United States District Court
S.D. Iowa, Davenport Division
June 30, 1950.

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17. Federal civil procedure-1681

The use of the word "denied" by one to whom requests for admissions have been made, in and of itself amounts to a specific denial of all of the affirmative facts set forth in the request, but when the word "denied' is qualified by a statement that the responding party does not have knowledge or information on which to for a belief, such a response is a nullity, since the legal effect is to

admit the facts contained in the request. Fed. Rules Civ. Proc. Rule 36 (a), 28 U.S.C.A.
See words and phrases, Permanent Edition, for the other judicial constructions and definition of "Denied".

18. Federal civil procedure-1681

The rule dealing with requests for admissions requires a absolute good faith and truthfulness in a response, and any responses which seek to evade or to avoid, short of a frank statement that the party cannot truthfully respond, stating the reasons or grounds therefore, will not be countenanced. Fed.Rules Civ. Proc. Rule 36 (a), 28 U.S.C.A.

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[17,18] This court is of the opinion, however, that the use of the word "denied" in and of itself does amount to a specific denial of all of the affirmative facts set forth in the request. When, however, the word "denied" is qualified by a statement that the responding party does not have knowledge or information upon which to form a belief, such a response is a nullity as the legal effect is to admit the facts contained in the request. The rule requires absolute good faith and truthfulness in a response and any responses which seeks to evade or avoid, short of a frank statement that the party cannot truthfully respond, stating the reasons or grounds therefore, will not be countenanced.

DUSSOUY v. GULF COAST INV. CORP.
660 F.2d 594 (1981) .....page 5

John W. DUSSOUY, Jr.
Plaintiff-Appellant,
v.
GULF COAST INVESTMENT CORPORATION,
Defendant-Appellee.
No. 80-3301.

United States of Appeals,
Fifth Circuit. *

Nov. 5, 1981
Rehearing Denied Dec. 2, 1981

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3. Federal Civil Procedure- 833
Policy of federal rules is to permit liberal amendment to facilitate
determination of claims on merits and to prevent litigation from
becoming a technical exercise in fine points of pleading. Fed. Rules
Civ.Proc. Rule 15(a), 28 U.S.C.A.

4. Federal Civil Procedure- 828
Unless there is substantial, reason to deny leave to amend pleading,
discretion of district court is not broad enough to permit denial. Fed.
Rules Civ.Proc. Rule 15(a), 28 U.S.C.A

Pg. 597 -598

[3,4] In our review of the trial court's exercise of discretion, rule 15(a) "Discretion" may be a misleading term, for rule, 15(a) severely restricts the judge's freedom, directing that leave to amend "shall be freely given when justice so requires". 56 evinces a bias in favor of granting leave to amend.

The policy of the federal rules is to permit liberal amendment to facilitate determination of claims on the merits and to prevent litigation from becoming a technical exercise in the fine points of pleading. See, e.g., Foman v. Davis, 371 U.S. at 182,83 S. CT. at 230, 9 L.Ed.2d at 225-26; Conley v. Gibson, 355 U.S. 41,48,78 S.Ct. 99,103, 2 L. Ed.2d 80, 86 (1957); Sherman v. Hallbauer, 5 Cir. 1972, 455 F.2d 1236, 1242. **Thus, unless there is a substantial reason to deny to amend, the discretion of the district court is not broad enough to permit denial.** See Lone Star Motor import v. Citroen Cars, 5 Cir. 1961, 288 F.2d 69, 75.

GRIFFITH V. WAINWRIGHT
772 F.2.D 822 (1985)
..... page 7

Jack Griffith, Plaintiff-Appellant
v.
Louie L. WAINWRIGHT, et al.,
Defendants-Appelles.
No. 85-3001
Non-Argument Calendar.

United States Court of Appeals,
Eleventh Circuit.
Sept. 30, 1985

Page 822
1. Federal Civil Procedure
Summary judgment cannot be entered against party unless that person had been given express notice, ten days in advance, of his rights under rule 56(c) and how he might best defend them. Fed. Rules Civ. Proc. Rule 56(c), 28 U.S.C.A.

Page 823
2. Federal Civil Procedure
Adverse party must be given express, ten-day notice of summary judgment rules, of his right to file affidavits or other material in opposition to the motion, and of consequences of default; that done, district court may properly take motion under advisement as of a day certain and may rule on motion consistent with dictates of procedural fairness required by Rule 56. Fed. Rules Civ. Proc. Rule 56(c), 28 U.S.C.A

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[1] Although this case come before us in the posture of a First Amendment case, we find it unnecessary to reach the question of whether the Appellant here stated a meritorious claim on the constitutional question. Instead, we are compelled by our own precedents to note sua sponte that the court below failed to adhere to the dictates of Fed. R.Civ. P. 56(c), which rule requires that summary judgment cannot be entered against a party unless that person has been express notice, ten days in advance, of his rights under that rule and how he might best defend them. 3

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[3] While it is well settled in this Circuit that this requirement does not of necessity require that such notice be given at an oral hearing, Moore, 703 F. 2d at 519, our jurisprudence requires at least this: that an adverse party must be given express, ten day notice of summary judgment rules, of his right to file affidavits or other material in opposition to the motion, and of the consequences of default. That done, the court may properly take the motion under advisement as of a day certain and may rule on the motion consistent with the dictates of procedural fairness required by Rule 56. Moore, 703 F. 2d at 519; Kibort v. Hampton, 538 F. 2d 90,91 (56th Cir. 1976).

HERRON V. BECK
693 F. 2d 125 (1982)

Vicel HERRON, Plaintiff-Appellant,
v.
James G. Beck, J.J. Culpepper, Sgt. Wheeler and Robert Holmes,
Defendants-Appellees.

No. 80-7727

United States Court of Appeals,
Eleventh Circuit.

Dec. 6, 1982

Page 126-127
Federal Civil Procedure-937 Where district court failed to comply with ten-day notice requirement of summary judgment rule in entering summary judgment against pro e litigant who challenged the removal of legal and educational materials from his jail cell, judgment would be reversed and remanded. ; 42 U.S.C.A. & 1983; Fed. Rules Civ. Proc. Rule 56(c), 28 U.S.C.A

[1] It is well established in this circuit that the ten-day notice requirement of Rule 56(c) 1 is strictly enforced. See, e.g., Hickey v. Arkla Industries, Inc., 615 F.2d 229,240 (5th Cir. 1980) (holding that "where the motion to dismiss is converted into a motion for summary judgment, the notice and hearing requirements of Fed. R. Civ. P. 12(b) and 56 (c) must be followed"); Underwood v. Hunter, 604 F.2d 367, 369 (5th Cir. 1979) (citing numerous former Fifth Circuit cases which have upheld "the

strict notice and hearing requirements...where the court sua sponte converts a 12(b)(6) motion into a summary judgment motion by considering matters outside the pleadings"). 2 Moreover, a court should be particularly careful to ensure proper notice to a pro se litigant. See Davis v. Zaharadnick, 600 F.2d 458, 460 (4th Cir. 1979) (holding that "before a motion for summary judgment is granted, the pro se plaintiff must be advised of his right to file counter affidavits or other responsive material and that he be alerted to the fact that his failure to so respond might result in the entry of summary judgment against him...In addition, the ...notice must be sufficiently clear to be understood by a pro se litigant and calculated to apprise him of what is required under Rule 56.

JOHNSON V. ZERBST,
WARDEN..... page 9,10

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT.

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2. This right may be waived; but the waiver must be an intelligent one; and whether there was such must depend upon the particular facts and circumstances, including background, experience, and conduct of accused. P. 464.

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Two. There is insistence here that petitioner waived this constitutional right. The District Court did not so find. It has been pointed out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiescence in the loss of fundamental rights". A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right of counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

JONES V. LAUGHLIN STEEL
750 F.2d 1214 (1985)
..... page 9

Alex JONES, Appellant,
v.
JONES & LAUGHLIN STEEL
CORP., Appellee.
No. 83-5840.

United States Court of Appeals,
Third Circuit.

Argued Sept. 10, 1984
Decided Dec. 28, 1984.

Page 1214
1. Federal Civil Procedure-840, 1272
In employee's race discrimination suit against employer, district court exceeded limits of sound discretion in denying employee's motions, filed when employee, who had filed the action per se, succeeded in retaining counsel after period for discovery had expired, for leave to file amended complaint and for extended period of discovery since employee acted diligently and in good faith to obtain counsel, and since employer did not allege that it would be prejudiced if the court granted the motion to file an amended complaint, and did not contest motion to extend the period for discovery. Civil Right Act of 1964, &701 et seq., 42 U.S.C.A. &2000E ET SEQ.; 42 U.S.C.A. & 1981.

Page 1215
2. Federal Civil Procedure- 2497

In employee's race discrimination suit against employer, genuine issues of material fact existed as to whether it was employer's policy not to post job openings or to specify qualifications for particular position, precluding summary judgment. Civil Right Act of 1964, &701 et seq., 42 U.S.C.A. &2000E ET SEQ.; 42 U.S.C.A. & 1981.

[1] For the reasons we articulate in Howze v. Jones & Laughlin Steel Corp., supra, we conclude that the district court exceeded the limits of sound discretion in denying Jones leave to file an amended complaint and to extend the period for discovery.

[2] In granting summary judgment J & L, the district court held that Jones had not established a prima facie case under Title VII because he had "not shown to which jobs the younger, white employees were promoted, nor what qualifications the defendant company considered for any job promotion." App. At 192a. Jones alleges, however, that is it the policy of J & L not to post job openings or to specify the qualifications for a particular position. Hence, Jones' only recourse to obtain such information was through the discovery process. We believe that Jones is entitled to a reasonable period in which to conduct discovery with the assistance of counsel.
The district court further concluded that there was "no evidence in support of a & 1981 claim." App. at 192a. Assuming, without deciding, that J & L would otherwise be entitled to summary judgment on this bias, we will nevertheless vacate the order granting summary judgment because our ruling reopening discovery may present a different record for the court's consideration.

LEVALD, INC. V. CITY OF PALM DESERT
998 F.2D 680 (9TH CIR.1993).....page 3

LEVALD INC., Plaintiff-Appellant,
v.
CITY OF PALM DESERT,
DEFENDANT-APPELLE.
No. 91-56315.

United States Court of Appeals,
Ninth Circuit.

Argued and submitted Feb. 4, 1993.
Decided July 8, 1993.

Page 683
23. Federal Courts- 817
District court's denial of plaintiff's request to amend its complaint is reviewed for abuse of discretion. Fed. Rules Civ. Proc. Rule 15(a), 28 U.S.C.A.

Page 691
[23] A district court's denial of plaintiff's request to amend its complaints pursuant to Federal Rule of Civil Procedure 15(a) is reviewed for abuse of discretion. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321,330,91 S.Ct. 795,802,28 L. Ed 2d 77 (1971). "A court is within its discretion to refuse amendment and dismiss the complaint if it 'concludes that the pleading as amended could not withstand a motion to dismiss.'" Hoover v. Langston Equip. Assoc., Inc, 958 F.2d 742,745, (6th Cir. 1992) (citation omitted). **However, the "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of Federal Rules."** Foman v. Davis, 371 U.S. 178,182, 83 S.Ct. 227,230,9 L.Ed.2d. 222 (1962).

MILBURN v. UNITED STATES
734 F. 2d 762 (1984) .....page 7

William R. Milburn and Richard V. Thompson,
Plantiffs-Appellants,
v.
The United States of America,
Defendant-Appellee.

No. 83-5248.
United States Court of Appeals,
Eleventh Circuit.

June 18, 1984

Page 763
7. The Eleventh Circuit strictly enforces ten-day notice requirements of Federal rule of civil procedure governing service of summary judgment motions. Fed. Rules Civ. Proc.Rule 56 (a), U.S.C.A.

8. District court erred in not giving litigants ten-day advance notice that it would take Government's summary judgment motion under advisement as of certain date. Fed. Rules Civ. Proc.Rule 56 (a), U.S.C.A.

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[6,7] It is well settled in this circuit that Rule 56(c) does not require and oral hearing. "Rather, 10-day advance notice to the adverse party that the motion and all materials in support of or in opposition to the motion to the motion will be taken under advisement by the trial court as of a certain day

satisfies the notice and hearing dictates of Rule 56." Moore v. Florida, 703 F.2d 516, 519 (11th Cir. 1983) (emphasis added), citing Barker v. Norman, 651 F. 2d 1107m 1119 (5th Cir. 1981); Capital Films Corp. v. Charles Fries Productions, 628 F.2d 387, 391-92 (5th Cir. 1980); Kibort v. Hampton, strictly enforces the 10-day notice requirement for all litigants.

MIRANDA V. ARIZONA
384 U.S. 436..... page 10

MIRANDA V. ARIZONA
CERTIORARI TO THE SUPREME COURT OF ARIZONA.
No. 759. Argued February 28-March 1,1966
Decided June 13, 1966

Page 436
This court always set high standards of proof for the waiver of constitutional rights, Johnson v. Zerbst, 304'U.S. 458 (1938), and we re-assert there standards applied to in-custody interrogation.

Page 475
"Presuming waiver from a silent record is impermissible: The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer, Anything less is not waiver."

PALKO V. CONNECTICUT. 302 U.S., 319..... page 11

PALKO v. CONNECTICUT.

APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT.

Page 327

Fundamental too in the concept of due process, and so on in that liberty, is the thought that condemnation shall be rendered only after trial. Scott v. McNeal, 154 U.S. 34; Blackmer v. United States, 284 U.S. 421. The hearing, moreover, must be a real one, not a sham or pretense. Moore v. Dempsey, 261 U.S. 86; Mooney v. Holohan, 294 U.S. 103. For this reason, ignorant defendants in a capital case were held to have been condemned unlawfully when in truth, though not in form, they were refused the aid of counsel. Powell v. Alabama, supra, pp. 67,68. The decision did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a federal court. The decision turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing.

POWELL V. ALABAMA 287 U.S. 45..... page 9

OZIE POWELL, WILLIE ROBERSON, ANDY WRIGHT, AND OLEN MONTGOMERY V. ALABAMA
HAYWOOD PATTERSON V. SAME.
CHARLEY WEEMS AND CLARENCE NORRIS V. SAME

Page 68-69

What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks bother the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of

feeble intellect. If in any case, civil or criminal, a state or federal couth were arbitrarily to refuse to hear a party by counsel, employed by appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

SARTOR et.al. v. ARKANSAS NATURAL GAS CORPORATON,321 U.S. 620..... page 5

SARTOR et.al. v. ARKANSAS NATURAL GAS CORPORATON,
No. 232
Argued Feb. 3, 1914.
Decided March 27, 1944.
Rehearing Denied April 24, 1944.

Page 725

5.Courts-354
Federal rule providing for summary judgment was not intended to cut off right of trial by jury where there are issues to try, and summary judgment should be granted only when moving party is entitled to judgment as a matter of law, the truth is quite clear and not genuine issue remains for trial. Federal Rules of Civil Procedure, rule 56(c), 28 U.S.C.A. following section 723c.

10. Courts-354
Affidavits of interested experts, whose opinions jury refused to follow at previous trial, that market price at well of gas produced under mineral leases providing for calculation of gas royalties...did not conclusively establish that market price of gas at well did not exceed 3 cent so as to justify summary judgment that lessors who had received 3 cent per m.c.f. for royalties.

Page 728

[5] The Court of Appeals below heretofore has

correctly noted that Rule 56 authorizes summary judgment only where the moving party id entitled to judgment as a matter lf law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try. In the very proper endeavor to terminate litigation before it for the fourth time, we think it overlooked considerations which make the summary judgment an inappropriate means to that very desirable end.

Page 729

[10] We think defendant failed to show that it is entitled to judgment as matter of law. In the stipulation, the bulletin, the affidavit of the plaintiff's attorney and the admission of it's witnesses, there is some, although far from conclusive, evidence of a market price or a value, under the rules laid down by the Court of Appeals, that supports plaintiffs' case. It may well be that the weight of the evidence would be found on a trial to be with defendant. But it may not withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony. And their credibility and the weight to be given to their opinions is to be determined.

SIEB'S HATCHERIES, Inc. v.
LINDLEY et al.
Civ. A. No. 1026.

United States District Court
W.D. Arkansas, Fort Smith Division.
Sept. 30, 1952

Page 114
2. Federal Civil Procedure-1676, 1691

The Federal Rules of Civil Procedure are binding upon the parties and the courts regardless of the views of individual judges administering them. Fed.Rules Civ. Proc. Rules 6(b), 36,28 U.S.C.A.
Page 119
[2] The Federal Rules of Civil Procedure are binding upon the parties and the courts, regardless of the views of individual judges administering them. Westland Oil Co. v. Firestone Tire & Rubber Co., D.C.N.
d., 3 F.R.D 55; Beasley v. United States, supra; Barrezuetta v. Sword S.S. Line, Inc., D.C.S.C.N.Y., 27 F.Suupp. 935. In Holt v. Werbe, 198 F.2d 910,the court for the Eight Circuit, by Judge Riddick, said: "The Rules of Civil Procedure are not advisory merely." In Canister Co. v. Leahy, 3 Cir.,182 F.2d 510, at page 514, the Court said: "The rules are rules of procedure. They must be adhered to." McCullough v. Cosgrave, Judge, 309 U.S. 634, 60 S.Ct. 703, 84 L.Ed. 992, was a petition for mandamus to compel the trial judge to try certain cases without referring them to a Master. The facts showed a persistent disregard of the rules and the writ was issued.

STATE OF WASHINGTON V. MARICOPA COUNTY
143 F. 2D 871

STATE OF WASHINGTON et. Al. v. MARICOPA COUNTY et. al.
No. 10493
United States Court of Appeals,
Ninth Circuit.
June 30, 1944

Page 872
Thus, instead of showing that there was no genuine issue as to any material fact, the pleadings showed that there were such issues. The affidavits showed nothing to the contrary. One of the supporting affidavits contained statements made on information and belief. These statements should have been disregarded. Each of the supporting affidavits contained statements of legal conclusions. 3 These, too, should have been disregarded. Numerous papers were referred to in each of the supporting affidavits. No sworn or certified copy of any such paper was attached to or served with either affidavit. Hence, all references to such papers should have been disregarded. We conclude that the motion for a summary judgment was not well founded and should have been denied. Judgment reversed and case remanded for further proceedings.

IN THE U. S. COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 06-16624-DD July 23, 2007

GEORGE V. SMITH,
Plaintiff-Appellant,
vs,

ORANGE COUNTY SCHOOL BOARD,
Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Florida

BEFORE: DUBINA, CARNES, and FAY, Ct. Judges

PER CURIAM:

The petition for rehearing filed by the Appellant is DENIED.

ENTERED FOR THE COURT:

s/ Fay,
UNITED STATES CIRCUIT JUDGE

IN THE U. S. COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 06-16624-DD June 4, 2007
Non-Argument Calendar

D. C. Dcoket No: 04- 1811- CV-ORL-28-DAB

GEORGE V. SMITH,
Plaintiff-Appellant,

vs,

ORANGE COUNTY SCHOOL BOARD,
Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(June 4, 2007)

BEFORE: DUBINA, CARNES, and FAY, Ct. Judges

PER CURIAM:

George V. Smith appeals the district court's grant of the School Board of Orange County's ("School Board") motion for summary judgment in Smith's pro se employment discrimination action. On appeal, Smith challenges several non-dispositive orders entered by the magistrate judge, the district court's denial of his motion to amend his complaint, and the court's grant of the School Board's summary judgment motion. For the reasons discussed more fully below, we affirm.

I. Background

In December 2004, Smith filed this pro se complaint against his former employer, the School Board of Orange County ("School Board"), alleging (1) race and age discrimination, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e-2, and the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 623(a); (2) retaliation, in violation of Title VII and 42 U.S.C. §§ 1981 and 1983; and (3) deprivation of procedural due process rights, in violation of the Fourteenth Amendment to the United States Constitution. The district court entered a case management and scheduling order, explicitly

indicating that "all parties (both represented and pro se) shall comply with this order [and] with the Federal Rules of Civil Procedure ...." The scheduling order also provided that the date by which all motions to amend pleadings had to be filed was September 16, 2005. Additionally, the scheduling order indicated the following with regard to motions for summary judgment:

> Each party opposing a motion for summary judgment shall serve, within thirty days after being served with such motion, a legal memorandum with citation of authorities in opposition to the relief requested as required by Local Rule 3.01(b). The memorandum in opposition shall specify the material facts as to which the opposing party contends there exists a genuine issue for trial, and shall be accompanied by affidavit(s) and other evidence in the form required by Fed. R. Civ. P. 56.... The Court takes a motion for summary judgment under advisement thirty days from the date it is served, unless the Court orders a different date. Unless specifically ordered, the Court will not hold a hearing on the motion. Failure to oppose any motion for summary judgment may result in the entry of a judgment for the movant without further proceedings.... All requirements in this [scheduling order] apply to pro se litigants as well as to parties represented by counsel.

Thereafter, Smith filed numerous motions relating to pre-trial discovery and Smith's representation by counsel. First, Smith filed a motion to compel witness to appear and be deposed, and a "motion to deem admitted" the admissions he served on the School Board. The magistrate denied both of those motions on November 23, 2005. Smith did not object to the magistrate's November 23 order. Next, Smith filed a large series of motions, including: (1) a "motion for order on compliance" requiring the School Board to comply with his request for admissions; (2) a "motion to determine sufficiency" requesting that the court find that the School Board's response to his complaint was insufficient; (3) another "motion to determine sufficiency"; (4) another "motion for order on compliance"; (5) two "rebuttals" to the School Board's response to his "motion to determine sufficiency"; and (6) an "amended motion to determine sufficiency." On May 12, 2006, the magistrate denied the motions and ordered the rebuttals stricken because they failed to comply with the local rules of the Middle District of Florida. On May 26, 2006, Smith filed objections to

the magistrate's May 12 order.

Smith later filed additional motions, including: (1) a motion for leave to file an amended complaint; (2) a "motion for intermittent appearance," requesting that the court permit him to retain counsel for certain specified actions; and (3) a motion for reconsideration of the magistrate's November 23, 2005 order, which motion he filed on June 9, 2006. The magistrate judge denied all of those motions on June 19, 2006, noting that counsel could not represent Smith in an "intermittent" fashion. Smith did not object to the magistrate's June 19 order.

Lastly, of relevance to the instant appeal, Smith filed the following motions: (1) a motion to compel responses to his interrogatories; (2) a "motion to determine sufficiency" of the School Board's response; (3) a "motion to compel [and] request for production"; (4) a "motion to limit time," requesting that the court not rule on any motion before three days from the date on which the motion was filed; (5) a "motion to compel" a witness to appear for a deposition; and (6) a "motion to compel" a response to his interrogatory. On

September 15, 2006, the magistrate denied all of the above-listed motions. Smith did not object to the magistrate's September 15 order, however, he filed a motion for reconsideration of that order on October 23, 2006.

Also on September 15, 2006, the School Board filed a motion for summary judgment. Smith did not file a response to the summary judgment motion. On October 19, 2006, however, Smith filed a motion for leave to file a second amended complaint, arguing that, through discovery, he had learned of new violations of the law committed by the School Board.

On November 21, 2006, the district court granted the School Board's motion for summary judgment and denied all pending motions as moot. The district court amended its order on November 29, 2006, though the record does not indicate a reason for the amended order and review of both orders reveals no substantive alterations. In its grant of the summary judgment motion, the court noted that Smith had not filed a response to the motion, but that the case management and scheduling order provided him with adequate

notice of his obligations regarding a summary judgment motion and that he had "sporadic legal assistance in this case." Smith filed a notice of appeal as to the district court's November 21 order granting the School Board's motion for summary judgment and the court's November 29 amended order.

II. Analysis

A. Magistrate Judge's Orders

In his appellate brief Smith requests reversal of four of the magistrate's orders, which were entered on the following dates: (1) November 23, 2005; (2) May 12, 2006; (3) June 19, 2006; and (4) September 15, 2006. In that regard, Smith argues that the magistrate erred in denying his various motions to compel depositions, require the School Board to respond to his request for admissions and interrogatories, and allow him to secure "intermittent" counsel.

We review a district court's discovery rulings for abuse of discretion. Maynard v. Bd. of Regents, 342 F.3d 1281, 1286 (11th Cir. 2003). We also review a district court's decision not to appoint counsel for abuse of discretion. United States v.

Berger. 375 F.3d 1223, 1226 (11th Cir. 2004). The orders at issue here were all entered by the magistrate judge. According to Federal Rule of Civil Procedure 72:

> A magistrate judge to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made.

Fed.R.Civ.P. 72(a). We have concluded that, where a party fails to timely challenge a magistrate's non-dispositive order before the district court, the party waived his right to appeal those orders in this Court. Maynard. 342 F.3d at 1286; see also Farrow v. West. 320 F.3d 1235, 1249 n.21 (11th Cir. 2003) (holding that a pro se litigant waived his right to appellate review of a magistrate's non-dispositive order by not objecting to the order before the district court, as required by Fed.R.Civ.P. 72(a)). In the instant case, it is

undisputed that each order that Smith appeals is a non-dispositive order, as none of the orders disposed of a claim or defense of any party. The School Board argues that Smith did not object to the magistrate's orders before the district court, and, thus, pursuant to Rule 72(a), he waived his right to raise those issues on appeal. Each order to which Smith asserts error is discussed in turn.

First, Smith claims that the magistrate erred in its November 23, 2005 order denying his motions to compel depositions and deem his admissions admitted. Smith did not object to that order before the district court, but rather, he filed a motion for reconsideration of the order on June 9, 2006. Because Smith did not file objections to the magistrate's November 23, 2005 order, he has waived that issue for purposes of this appeal. See Fed.R.Civ.P. 72(a); see also Maynard, 342 F.3d at 1286. Further, even to the extent that his motion for reconsideration could be construed as objections to the order, that motion was filed beyond the 10-day limitation period for filing such objections, as specified in Rule 72(a).

Second, Smith maintains that the

magistrate's May 12, 2006 order was similarly erroneous. Even though the School Board's argument on appeal contends otherwise, the record reflects that, on May 26, Smith did file objections to the May 12 order. As an initial matter, it is unclear whether Smith filed his objections within the time limit specified in Rule 72(a), namely, that objections must be filed within 10 days of being served with the magistrate's order. See Fed.R.Civ.P. 72(a). It is apparent that the objections were filed more than 10 days from the date that the magistrate issued the order, May 12, 2006, but it is not clear on what day Smith was served with that order. However, the district court's docket sheet indicates that copies of the May 12 order were mailed to Smith on May 15, 2006, and, thus, it is reasonable to assume that the earliest date on which Smith could have received the copy of the order was May 16, 2006, which would have made his objections filed on May 26 timely. See Fed.R.Civ.P. 72(a). Regardless, construing Smith's pro se brief liberally, and considering that the School Board does not contend that Smith filed the objections more than 10 days after he was served

with the magistrate's order, we conclude that Smith's objections to the Magistrate's May 12 order were timely filed, pursuant to Rule 72(a). Nevertheless, review of the record reveals that the district court never ruled on the merits of Smith's objections, but the court did indicate in its order granting the School Board's motion for summary judgment that it denied all pending motions as moot. In light of our decision to affirm the district court's grant of the School Board's motion for summary judgment, discussed more fully below, and Smith's lack of argument in his appellate brief that his objections to the magistrate's order, which denied Smith's various discovery motions, were not moot, we affirm the district court's finding that the pending objections were moot.

Third, Smith argues that the magistrate's June 19, 2006 order was also erroneous. Smith did not file objections to this order, and, accordingly, he waived his right to appeal that issue. See Fed.R.Civ.P. 72(a); see also Maynard. 342 F.3d at 1286. Lastly, Smith contends that the magistrate's September 15, 2006 order was erroneous. Again, Smith did not object to the magistrate's order,

though, on October 23, 2006, he did file a motion to reconsider that order. Nonetheless, to the extent that Smith's motion for reconsideration can be construed as an objection to the magistrate's September 15 order, it did not meet the 10-day time limit of Rule 72(a) because Smith filed it more than 30 days after the magistrate entered the order and, presumably, long after Smith was served with the order. See Fed.R.Civ.P. 72(a); see also Maynard. 342 F.3d at 1286.

B. Motion to Amend Complaint

In addition to appealing the four orders of the magistrate, Smith also appeals the district court's denial of his motion to amend his complaint, which he filed approximately one month after the School Board filed its motion for summary judgment. Smith asserts that he sought to amend his complaint in order to include facts and claims of which he had become aware only after the School Board withheld those facts from him during discovery.

We have explained that we "will only reverse a district court's denial of a motion to amend in instances in which the district court has clearly

abused its discretion." Henson v. Columbus Bank & Trust Co. 770 F.2d 1566, 1575 (11th Cir. 1985). Pursuant to Fed.R.Civ.P. 15(a), a party seeking to amend its complaint after it previously has amended the complaint, or after a responsive pleading has been filed, may amend the complaint "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed.R.Civ.P, 15(a). However, where a party's motion to amend is filed after the deadline for such motions, as delineated in the court's scheduling order, the party must show good cause why leave to amend the complaint should be granted. See Fed.R.Civ.P. 16(b); Sosa v. Airprint Systems. Inc.. 133 F.3d 1417, 1419 (11th Cir. 1998).

Here, it is undisputed that Smith previously had amended his original complaint and that the School Board had filed a responsive pleading to Smith's amended complaint. Further, the district court had entered a scheduling order that set forth the deadline for amending pleadings: September 16, 2005. Therefore, despite Smith's argument on appeal that the district court should have granted his motion to amend his complaint in accordance

with the liberal amendment instructions of Rule 15(a), Smith still had to comply with Rule 16(b)'s good cause requirement because he filed his motion to amend on October 19, 2006, more than one year after the court's deadline for such motions. See Sosa. 133 F.3d at 1419 (explaining that, where a party files a motion to amend within the time prescribed in the court's scheduling order, this Court focuses on Rule 15(a) on appeal; but, where a party files an untimely motion to amend, this Court must first determine whether the party complied with Rule 16(b)'s good cause requirement).

Careful review of Smith's motion to amend his complaint reveals that Smith did not indicate with any specificity the good cause he had for untimely moving to amend his complaint. Smith alleged that discovery had "produced new violations of the [l]aw that must be addressed within the counts of the complaint," but he failed to further indicate what those new violations were, what facts supported them and why those facts previously were undiscoverable. Furthermore, the School Board's motion for summary judgment had been

pending for approximately one month prior to Smith's motion to amend his complaint. The district court never ruled expressly on Smith's motion, but it denied the motion as moot when it granted the School Board's motion for summary judgment and made a general denial of all pending motions as moot. Given the extreme untimeliness of Smith's motion and his lack of a complete showing of good cause, the district court did not abuse its discretion in denying Smith the opportunity to amend his complaint before the court ruled on the summary judgment motion and denied all pending motions as moot.

C. Motion for Summary Judgment

Smith argues on appeal that the district court erroneously granted the School Board's motion for summary judgment without first entering an order that specified a time by which he had to file his response to the summary judgment motion. Smith contends that he did not respond to the summary judgment motion because he was awaiting a notice from the court specifying a hearing date. He asserts that, according to Fed.R.Civ.P. 56, the court was required to notify

him at least 10 days prior to its ruling that (1) it intended to rule on the motion without first holding a hearing and (2) he had an opportunity to respond to the motion prior to the ruling.

We review a district court's grant of summary judgment de novo. Brooks v. County Comm'n of Jefferson County, Ala., 446 F.3d 1160, 1161 (11th Cir. 2006). Pursuant to Fed. R. Civ.P. 56(c), a motion for summary judgment "shall be served at least 10 days before the time fixed for the hearing." We have interpreted the notice requirement of Rule 56 as requiring "10-day advance notice to the adverse party that the motion and all materials in support of or in opposition to the motion will be taken under advisement by the trial court as of a certain day." Milburn v. United States, 734 F.2d 762, 765 (11th Cir. 1984) (emphasis in original). "It is well settled in this circuit that Rule 56(c) does not require an oral hearing." Id. However, Rule 56(c) notice "requires at least this: that an adverse party must be given express, ten-day notice of the summary judgment rules, of his right to file affidavits or other material in opposition to the motion, and of the

consequences of default." Griffith v. Wainwright. 772 F.2d 822, 825 (11th Cir. 1985). Thereafter, "the court may properly take the motion under advisement as of a day certain and may rule on the motion consistent with the dictates of procedural fairness required by Rule 56." Id. "We have held repeatedly that this requirement of notice will be deemed strictissimi juris and applies to all parties litigant." Id. (emphasis in original). Moreover, "a court should be particularly careful to ensure proper notice to a pro se litigant... so that any rights that such a litigant might have will not be extinguished merely through failure to appreciate the subtleties of modern motion practice." Id (quotation and citation omitted).

Here, the district court's case management and scheduling order met all the requirements of Griffith. Specifically, the scheduling order indicated that (1) a party opposing a motion for summary judgment had 30 days from the date of service to respond to the motion; (2) the response had to include a legal memorandum, affidavits, and other evidence establishing the existence of a genuine issue for trial; (3) the court would take the

motion under advisement 30 days from the date it was served; (4) unless otherwise ordered, the court would not hold a hearing on the motion; (5) failure to respond to the motion could have resulted in the entry of judgment for the movant; and (6) the requirements applied to both counseled and pro se parties. The record reveals that the district court complied with the dates established in the scheduling order because it did not grant the School Board's motion for summary judgment until more than 60 days after it was filed, thereby providing 30 days for Smith to respond and 30 days in which the motion was under advisement by the court. Therefore, the district court provided Smith proper notice, as required under Rule 56(c).[1]

In light of the foregoing, the district court's grant of the School Board's motion for summary judgment and its denial of Smith's pending motions as moot is

AFFIRMED.

[1]To the extent that Smith argues in his reply brief that the district court should have voided the scheduling order upon receipt of his objections to that order, his argument is without merit. Smith filed objections to the court's scheduling order after issuance of the order, arguing that his counsel had negotiated the scheduling order with the School Board, but his counsel improperly waived his right to discovery. Given that Smith's sole objection to the scheduling order had to do only with the discovery process, and not the process by which the court would dispose of motions for summary judgment, Smith cannot now complain that his objection to the scheduling order included objecting to the court's summary judgment procedure. See Access Now. Inc. v. Southwest Airlines Co. 385 F.3d 1324, 1331 (11th Cir. 2004) (holding that this Court will not consider issues not raised before the district court and raised for the first time on appeal).

U. S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

GEORGE V. SMITH,
Plaintiff,
vs, CASE NO: 6:04-CV-1811-ORL-28

ORANGE COUNTY SCHOOL BOARD,
Defendant.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court on a Motion for Summary Judgment. The issues have been tried or heard and a decision has been rendered,

IT IS ORDERED AND ADJUDGED

That judgment is entered in favor of Defendant, School Board of Orange County, and against the Plaintiff, George V. Smith.

Date: November 24, 2008

SHERYL L. LOESCH, CLERK

s/J. Thigpen, Deputy Clerk

U. S. DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

The following transaction was entered on 11/24/2006 at 9:36 AM EST and filed on 11/24/2006.

Case Name:
Smith v. School Board of Orange County
Case Number:
6:04-cv-1811
Filer:
Document Number: 123

Docket Text:
JUDGMENT in favor of School Board of Orange County against George V. Smith
(Signed by Deputy Clerk) (JET)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

GEORGE V. SMITH
Plaintiff

-vs- Case No. 6:04-cv-1811-Orl-28DAB

ORANGE COUNTY SCHOOL BOARD,
Defendant.

ORDER

Plaintiff, George V. Smith ("Mr. Smith"), brought the instant action against his former employer, the Orange County School Board ("School Board" or "Orange County"), alleging discrimination, retaliation, and denial of procedural due process. Mr. Smith alleges that after he was terminated in 2000 by the School Board, that he was discriminated against by not being rehired on account of his race and his age. Mr. Smith also claims that he suffered retaliation by the School Board because they did not rehire him and because the Board permitted others to believe that he had been terminated for cause. He claims that this retaliation stems from the charge of discrimination he made with the EEOC following his 2000

termination and because he exercised his rights under the First, Thirteenth, and Fourteenth Amendments. Finally, he claims that he was denied due process as a prospective employee in that he was not permitted to challenge or appeal what he claims are civil rights violations.

This case is before the Court on the Motion for Summary Judgment (Doc. 98) filed by Orange County. Mr. Smith has not filed a response to the motion.[1] Having considered the record in this case and pertinent law, the Court concludes that Orange County's motion must be granted.

I. Background

Mr. Williams began his employment with Orange County in August 2000 as a mathematics instructor at West Orange High School. He was terminated on September 15, 2000. While the School Board cited his "overly harsh attitude and extreme disciplinary practices" to the EEOC as the basis for his discharge (Doc. 98 at 2, 9), Mr. Smith denies those allegations.[2] He was terminated after approximately 19 work days (Dep. of PL., Doc. 99, at 28:8-13).

It is undisputed that Mr. Smith was terminated within the probationary period established by his contract and by section 1012.33(1)(b), Florida Statutes, formerly section 231.36, Florida Statutes. (Doc. 98 at 2; Dep. of PL., at 28:11-13.) During the probationary period "the employee may be dismissed without cause or may resign from the contractual position without breach of contract." Fla. Stat. § 1012.33(1)(b) (2006). Following his firing, Mr. Smith filed a complaint with the EEOC, which issued a right to sue letter to him. He filed another EEOC complaint regarding the factual issues of this case in 2004, and he received another right to sue letter. The basis of his 2004 complaint and this case is that the School Board retaliated against him for filing the EEOC complaint and that they have refused to re-hire him since 2000 because of his race (African American) and his age (fifty-three).

II. Discussion

A. Summary Judgment Standards

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of establishing that no genuine issues of material fact remain. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256(1986).

In ruling on a motion for summary judgment, the Court construes the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000). However, summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). When

faced with a "properly supported motion for summary judgment, [the nonmoving party] must come forward with specific factual evidence, presenting more than mere allegations." Gargiulo v. G.M. Sales. Inc., 131 F.3d 995, 999 (11th Cir. 1997). However, a "'district court cannot base the entry of summary judgment on the mere fact that the motion was unopposed but, rather, must consider the merits of the motion.'" Trs. of the Cent. Pension Fund v. Wolf Crane Serv., Inc., 374 F.3d 1035,1039 (11th Cir. 2004) (quoting United States v. One Piece of Prop., 5800 S.W. 4th Ave., Miami. Fla., 363 F.3d 1099, 1101 (11th Cir. 2004)).

B. The Merits of Orange County's Motion

As earlier noted, Mr. Smith has not filed a response to the motion for summary judgment. The Court has, however, as required by Eleventh Circuit case law, considered the motion on its merits. See, e.g., Trs. of the Cent. Pension Fund. 374 F.3d at 1039.

1. Retaliation Under Title VII and § 1981

Mr. Smith claims that the School Board has refused to hire him again as retaliation for his

EEOC filing in 2000. Specifically, Mr. Smith raises three claims of retaliation under Title VI the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e[3] and 42 U.S.C. § 1983 for exercising his rights under the First, Thirteenth, and Fourteenth Amendments (PL's Compl. Counts I, III & IV.)[4]

The Title VII and § 1983 claims are considered first. A § 1981 claim and a Title VII claim are analyzed under the same framework.[5] Wilson v. Farley, No. 06-10417, 2006 WL 2578200, slip op. at *6 (11th Cir., Sept. 8, 2006). Because Plaintiff has no direct evidence of retaliation, his prima facie case must show that "(1) []he participated in an activity protected by Title VII; (2) []he suffered an adverse employment action; and (3) there is a causal connection between the participation in the protected activity and the adverse employment decision." Wilson. 2006 WL 2578200, at * 6 (quoting Gupta v. Florida Bd. of Regents. 212 F.3d 571, 587 (11th Cir. 2000)). Orange County argues that Mr. Smith has not met his prima facie burden because he cannot establish a causal connection between his allegedly protected

activity and the School Board's refusal to rehire him. (Doc. 98 at 5.) Orange County argues that even if Mr. Smith was engaged in protected activity, it will not rehire him because the school's policy and business practice is that it will not consider any instructor who was terminated during the 97-day probationary period for rehire, which, it states, is a legitimate non-discriminatory business practice.

Of the three prongs in the prima facie burden, the second prong is easily established Failure to hire constitutes a qualifying adverse employment action. See Gupta. 212 F.3d at 587 ("An adverse employment action is an ultimate employment decision, such as discharge or failure to hire..."). As for the first prong in the retaliation framework, filing a formal charge of discrimination with the EEOC is often deemed a protected activity, as are less formal means of challenging unlawful employer conduct. Wilson, 2006 WL 2578200, at *6 (citing Shannon v. Bellsouth Telecomms., Inc., 292 F.3d 712, 716 n.2 (11th Cir. 2002)).

To qualify as a protected activity requires that "a plaintiff must show that []he had a good faith, reasonable belief that the employer was engaged in unlawful employment practices." Id. (quoting Weeks v. Harden Mfg. Corp., 291 F.3d 1307,1311 (11th Cir. 2002)). His subjective belief that he was discriminated against is insufficient; the belief must also be reasonable. Id. Mr. Smith's only evidence is his assumption that his 2000 termination - the basis of his EEOC charge - was due to his race. Furthermore, Mr. Smith offers nothing to bolster his denials that his termination resulted from his overly harsh disciplinary practices.[6] Even though the School Board has stated a reason for the 2000 dismissal, the School Board was within its rights to terminate Mr. Smith even without cause during his probationary period. His claim of discrimination seems unreasonable in light of the facts in the record. Thus, Mr. Smith does not appear to have been engaged in statutorily protected conduct when he filed his EEOC claim.

Assuming Mr. Smith had engaged in protected activity, however, he encounters some

trouble establishing the requisite causal connection between his complaint and his not being rehired. The causal nexus requires that the employer know of the protected conduct and that the failure to hire must be "not wholly unrelated" to the protected activity. Gupta, 212 F.3d at 590 (quoting Farley v. Nationwide Mut. Ins., 197 F.3d 1322,1337 (11th Cir. 1999)). Often, temporal proximity is the best indicator of the causal connection, Farley, 197 F.3d at 1337, but "mere temporal proximity between the filing of the charge of discrimination and the action alleged to have been taken in retaliation for that filing will rarely be sufficient in and of itself to create a triable issue." Stone, 281 F.3d at 644 (citing Bass v. Bd. of County Comm'rs, 256 F.3d 1095, 1119 (11th Cir. 2001). The "elapsed time must be very short." Miller v. Potter, No. 05-15897, slip op., 2006 WL 2167898, at *5 (11th Cir. 2006) (characterizing a three-month interval, without further evidence, insufficient to establish an inference of retaliation) (citing Clark County Sch. Dist. v. Breeden, 532 U.S. 268,273 (2001) and

Higdon v. Jackson, 393 f.3d 1211, 1220 (11th Cir. 2004)).

Mr. Smith was terminated in 2000 and soon thereafter, he filed an EEOC complaint. The record is unclear as to whether or when Orange County became aware of that complaint; but it was dismissed and Mr. Smith was issued a right to sue letter in September 2001. He filed another charge, raising the claims asserted here, in 2004. Although he was not rehired in the years 2001-04, subsequent to his initial complaint, Mr. Smith has failed to provide any evidence of a causal connection between the two. Especially given the stated business practice and policy of the School Board, it appears that Mr. Smith cannot carry his prima facie burden.

If Mr. Smith had met his prima facie burden, his claims must still fail because Orange County has proffered a legitimate nondiscriminatory reason for not rehiring Mr. Smith that he has failed to rebut. See Gupta, 212 F.3d at 590 ("Once the plaintiff makes out a prima facie case, the burden shifts to the defendant to rebut the presumption of

retaliation by producing legitimate reasons for the adverse employment action.") (quoting Sullivan v. Nat'l R.R. Passenger Corp., 170 F.3d 1056,1059 (11th Cir. 1999)); see also Wilson, 2006 WL 2578200, at *7. "If the defendant presents unrebutted evidence of a noninvidious reason for the adverse action, he is entitled to summary judgment." Stone v. City of Indianapolis Pub. Utils. Div., 281 F.3d 640, 644 (7th Cir. 2002); see also Combs v. Plantation Patterns, 106 F.3d 1519, 1535 (11th Cir. 1997) (acknowledging that an employer is entitled to judgment as a matter of law when its nondiscriminatory reasons for taking the adverse employment action are not rebutted by the plaintiff).

Superintendent of Schools, Ron Blocker, is responsible for recommending personnel for hire and for dismissal. (Blocker Aff. ¶ 3.) Mr. Blocker has stated that he does not nominate personnel for hire if they have been previously terminated by the School Board within the 97-day probationary period. (Blocker Aff. ¶ 5.; Doc. 98 at 6.) He has sworn that the above policy is his business practice

and that pursuant to that practice, he will not nominate Mr. Smith for reemployment. (id. at ¶¶ 5, 7.) Orange County has satisfied its burden of production under the burden-shifting framework. Thus, assuming that Mr. Smith had raised a presumption of retaliation, Orange County has successfully rebutted it.

The County's presentation of a nondiscriminatory justification shifts the burden back to Mr. Smith to show that the Orange County's proffered reason is merely pretext for its retaliatory motive. See Wilson, 2006 WL 2578200, at *7 n.5. "To show that the employer's reasons were pretextual, the plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could find them unworthy of credence." Id. (quoting Cooper v. Southern Co., 390 F.3d 695, 725 (11th Cir. 2004)). At this stage of rebuttal, "the plaintiff must persuade the trier of fact that the defendant discriminated against h[im]... The plaintiff cannot simply stand on h[is]

prima facie case..." Walker v. Mortham, 158 F.3d 1177, 1184-85 (11th Cir. 1998) (citations omitted). Orange County is entitled to summary judgment because Mr. Smith has not offered any evidence to create a genuine issue of material fact regarding pretext. See Cooper. 390 F.3d at 725-26 (citing Chapman v. Al Transp., 229 F.3d 1012, 1024 (11th Cir. 2000)). Mr. Smith has relied on nothing more than bare legal assertions, "conclusory allegations," and speculation, none of which will defeat a motion for summary judgment. See Wilson, 2006 WL 2578200, at *7 n.5.

2. Retaliation Under § 1983

Mr. Smith has also made a claim of retaliation under § 1983[7] for exercising his First, Thirteenth and Fourteenth Amendments. (PL's Compl. Count IV.) Section 1983 establishes "a cause of action for persons injured as a result of a 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws' under color of state law." Palmer v. Stewart County Sen. Dist., 178 Fed. Appx. 999,1002 (11th Cir. 2006). A local government will be "liable under § 1983 'when the

execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury..." Mandel v. Doe, 888 F.2d 783, 791 (11th Cir. 1989) (quoting Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978)). School Boards are considered branches of local government and thus fall within the Monell requirements. Bartes v. Sch. Bd., No. 04-15459, 2005 U.S. App. LEXIS 23386, at *12 n.5 (11th Cir. 2005) (noting that a county school board was an improper defendant because there is no respondeat superior liability under § 1983, and so a plaintiff must prove a policy or custom); Holloman v. Harland, 370 F.3d 1252,1291-94 (11th Cir. 2004) (requiring a school board to have an established policy or custom in order to be liable under § 1983 for violating rights secured by the Constitution); Denno ex rel. Denno v. Sch. Bd., 218 F.3d 1267, 1276 n.9 (11th Cir. 2000). Although an arguable policy or custom plays a role in this case[8] - that persons terminated during their probationary period are not eligible for rehire - that unofficial

policy is unrelated to race and is not a policy of retaliation. Mr. Smith has not shown that this policy is one of retaliation or discrimination, or that it has either effect on prospective applicants.

To state a claim under § 1983 for First Amendment retaliation, Mr. Smith would need to establish that his speech was on a matter of public concern, that the First Amendment interests of the employee outweigh the interests of the employer, that the protected speech played a substantial part in the employment decision, and finally that "the employer must prove that it would have reached the same decision 'even in the absence of the protected [speech].'" Brochu v. City of Riviera Beach, 304 F.3d 1144, 1157 (11th Cir. 2002) (quoting Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)). Orange County argues that Plaintiff's EEOC filing did not touch a matter of public concern because his ultimate goal - to get his job back - was a personal one. (Doc. 98 at 11.) Although there is support for the proposition that filing an EEOC charge of discrimination for personal motives or to complain about personally-

suffered discrimination is not speech on a matter of public concern, see Badia v. City of Miami, 133 F.3d 1443, 1445-46 (11th Cir. 1998); Hazel v. Sch. Bd., 7 F. Supp. 2d 1349,1355 (S.D. Fla. 1998), it seems that some charges of discrimination - even if personally motivated - are political and social concerns of great importance to a community.

Thus, even assuming that Mr. Smith's initial complaint regarding race and age discrimination touched on matters of public concern and was protected, and even assuming that his speech was somehow related to his not being rehired, Orange County has shown that it would have reached the same decision even in the absence of his "protected" speech. Orange County's policy is that it does not rehire persons terminated during the 97-day probationary period. Based on Orange County's stated policy, that it would have reached the same result even if Mr. Smith had not filed his EEOC complaint. The employer has a "legitimate reason, [that] standing alone, would have induced it to make the same decision." Brochu, 304 F.3d at 1157 (quoting Price Waterhouse v. Hopkins, 490 U.S.

228,252 (1989)). Therefore, summary judgment must be granted to Defendant Orange County on this claim.

Plaintiff also claims that he was retaliated against for exercising his rights under the Thirteenth Amendment in seeking an employment contract with the School Board as a qualified black person. (PL's Compl. ¶ 28.) The Thirteenth Amendment "gives Congress the authority to legislate against acts of any state and any private individual which constitute the 'badges and incidents of slavery." Baker v. McDonald's Corp., 686 F. Supp. 1474, 1480 n.12 (S.D. Fla. 1987) (quoting U.S. Const, amend. XIII). There is no cause of action for employment discrimination in the Thirteenth Amendment, although those rights may be asserted under § 1981. Id. The § 1981 claim may then proceed under § 1983 against a state actor. To prevail on this claim, Plaintiff must show, at a minimum that he experienced intentional discrimination on the basis of his race, Id. at 1481. This claim is duplicative of his other claims and

thus, summary judgment in favor of Orange County is appropriate.

Finally, Mr. Smith alleges that he was retaliated against in violation of his due process rights secured by the Fourteenth Amendment. Presumably, Mr. Smith claims the School Board violated his due process rights by denying him a job. Orange County responds by arguing that this general, nonspecific allegation will not support a claim against the Board. (Doc. 98 at 13) (citing Madiwale v. Savaiko, 117 F.3d 1321, 1328 (11th Cir. 1997.) Even assuming that Mr. Smith has stated a claim under the Fourteenth Amendment, he possesses no due process rights, substantially or procedurally, in prospective employment, as fully articulated below. Therefore, Mr. Smith had no due process rights which could have been violated in retaliation for filing his EEOC charge.

3. Race and Age Discrimination

Mr. Smith also claims that the Orange County School Board discriminated against him on account of his race and his age in violation of Title VII and the Age Discrimination in Employment Act

("ADEA"), 29 U.S.C. § 633a, et seq., when he was not rehired after his termination. (PL's Compl. Counts II & III.) Because Mr. Smith has no direct evidence of discrimination, his circumstantial evidence claims are analyzed under the burden-shifting framework of McDonnell Douglas Corp. v. Green. 411 U.S. 792 (1973), and its progeny. See Kelliher v. Veneman, 313 F.3d 1270, 1275 (11th Cir. 2002) (applying McDonnell Douglas to plaintiffs racism and ageism claims); Chapman v. Al Transport, 229 F.3d 1012, 1024-25 (11th Cir. 2000) (same). Under this framework, the plaintiff has the initial burden of establishing a prima facie case of discrimination by a preponderance of the evidence McDonnell Douglas, 411 U.S. at 802. As the Eleventh Circuit has noted, "[d]emonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination." Holifield v. Reno, 115 F.3d 1555,1562 (11th Cir. 1997). If the plaintiff establishes a prima facie case, a presumption of discrimination arises. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981).

Once the plaintiff has presented a prima facie case and its attendant presumption, the burden "shift[s] to the employer to articulate some legitimate, nondiscriminatory reason" for its actions. McDonnell Douglas, 411 U.S. at 802. The employer's "burden is one of production, not persuasion; it 'can involve no credibility assessment.'" Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133,142 (2000) (quoting St. Mary's Honor Ctr. v. Hicks. 509 U.S. 502, 509 (1993)). If the employer meets its burden of production, it is entitled to summary judgment unless the plaintiff presents evidence creating a genuine issue of material fact regarding whether the employer's articulated reason is a mere pretext for discrimination. See, e.g., Chapman, 229 F.3d at 1024-25 ("If the plaintiff does not proffer sufficient evidence to create a genuine issue of material fact regarding whether each of the defendant employer's articulated reasons is pretextual, the employer is entitled to summary judgment on the plaintiff's claim."); accord Evans v. McClain of Ga., Inc., 131 F.3d 957,964-65 (11th Cir. 1997) ("Under

the established rule of law in this Circuit, a plaintiff can survive a motion for summary judgment or for judgment as a matter of law by presenting evidence sufficient to demonstrate a genuine issue of material fact as to the truth or falsity of the employer's legitimate, nondiscriminatory reasons.").

A plaintiff may make a prima facie showing of discriminatory termination under Title VII by establishing: (1) that he is a member of a protected class; (2) that he was subjected to an adverse employment decision; (3) that the plaintiff was at least minimally qualified to do the job; and (4) that the employer treated a similarly-situated employee outside of the protected class more favorably. Roland v. U.S. Postal Serv., No. 06-12261, slip op., 2006 WL 2881949, at M (11th Cir. Oct. 11,2006); Wilson v. B/E Aerospace. Inc., 376 F.3d 1079, 1087 (11th Cir. 2004); Kelliher v. Veneman, 313 F.3d at 1270, 1275 (11th Cir. 2002). Orange County does not dispute that Mr. Smith satisfies the first three hurdles of his prima facie burden, but the County contends that he has failed to establish that he was

treated differently than similarly-situated others who are not in the protected class.

"To show that employees are similarly situated, the plaintiff must establish that the employees are 'similarly situated in all relevant respects.'" Roland, 2006 WL 2881949, at *4 (quoting Wilson, 376 F.3d at 1091). "If a plaintiff fails to show the existence of a similarly situated employee, summary judgment is appropriate where no other evidence of discrimination is present." Holifield, 115 F.3d at 1562; see also Davis v. Mgmt. Tech., No. 05-00118, slip op., 2006 WL 2356142, at *1-2 (11th Cir. Aug. 16, 2006).

Mr. Smith has failed to identify a similarly-situated comparator as part of his prima facie burden. At his deposition, Mr. Smith was asked if he knew of any person who had been rehired after having been terminated during their probationary period despite the School Board's stated business policy. (Smith Dep. 94:1-11.) Mr. Smith replied "No. I also don't know of any employee who has not been hired, other than myself, who was terminated within the 97-day period." (Id.) Although Mr. Smith

made unsubstantiated allegations regarding discovery abuses on the part of Orange County during his deposition,[9] he has still failed to produce one piece of evidence regarding discrimination beyond his accusations and assumptions. Mr. Smith has failed to make out his prima facie case and thus summary judgment shall be granted. See Holifield, 115 F.3d at 1562.

Even assuming that Mr. Smith had made out his prima facie case for race and/or age discrimination, he has still failed to rebut the legitimate nondiscriminatory reason proffered for not rehiring him. Plaintiff used the magic words during his deposition, stating that the reason given was mere "pretext," (Smith Dep. 113:22-114:5), but without any evidence to show in response, summary judgment for Defendant Orange County is appropriate. There is no evidence of discriminatory intent in this case, and no triable issue remains as to whether Orange County's explanation for its refusing to rehire Mr. Smith is merely pretext for discrimination.

Included under Mr. Smith's counts of race and age discrimination, are allegations of disparate impact in hiring because of race and age. (PL's Am. Compl. ¶¶ 16, 18, 20 & 21.) Mr. Smith has also not borne out a prima facie case of disparate impact discrimination because he has failed to identify a "specific, facially-neutral employment practice" or "a significant statistical disparity in the racial composition of employees benefitting from the practice and those *qualified* to benefit from the practice," much less a causal connection between the two. Lee v. Dep't of Child. & Fam. Servs., 135 Fed. Appx. 202, 204-05 (11th Cir. 2005) (citing EEOC v. Joe's Stone Crab, 220 F.3d 1263, 1268, 1274 (11th Cir. 2000)). Even assuming that the practice of not rehiring an employee who was terminated within the probationary period -which serves as the County's unrebutted legitimate nondiscriminatory reason for refusing to rehire Mr. Smith - was also the specific, facially neutral practice that Mr. Smith claims leads to a disparate impact, the only arguably statistical evidence presented by him is a breakdown, according to race,

of the persons dismissed during the 97-day probationary period. (Doc. 73, Attach. D). It is not entirely clear where this chart came from, or who prepared it, but even assuming its accuracy, it does not assist Mr. Smith in proving his case. Not only is this chart presented irrelevant because it documents dismissals and not rehires, but the chart is also virtually meaningless in the absence of other statistical data that might provide a context or benchmark with which to evaluate the numbers presented. Because Mr. Smith has not established a prima facie case for disparate impact discrimination on the basis of race or age, summary judgment must be granted in favor of the Orange County.

4. Deprivation of Due Process

Finally, Mr. Smith alleges, somewhat repetitively of his § 1983 retaliation claim regarding his Fourteenth Amendment rights that he has been denied due process as a "prospective employee^ to challenge violations of the Civil Rights Acts" and that "Defendants [sic] Equal Opportunity program is designed only to provide

answers to the EEOC justifying its actions in not hiring and makes no effort to assess the veracity of the answers." (Am. Compl. ¶¶ 31 & 32.) Orange County correctly argues that this claim, like the one discussed above for retaliation, must be brought under § 1983. (Doc. 98 at 18-19.) Thus, Mr. Smith must show that he was deprived of "rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983.

"The protections of the Due Process Clause apply to government deprivation of those prerequisites of government employment in which the employee has a constitutionally protected 'property' interest." Gilbert v. Homar, 520 U.S. 924, 928 (1997). There is no protected property or liberty interest in prospective employment. Martinez v. City of New York, 82 Fed. Appx. 253, 254 (2d Cir. 2003); Moore v. Muncie Police & Fire Merit Comm'n, 312 F.3d 322, 326 (7th Cir. 2002). Even though Mr. Smith had been hired in 2000, he was terminated during his probationary period after only nineteen working days on the job. That brief stint as a teacher in the Orange County School

System did not give Mr. Smith an understanding that he would or could be rehired, nor did it give him a property interest in being reemployed by the entity that fired him. According to section 1012.22(1)(a)(4), Florida Statutes, during the period of time that Mr. Smith was terminated, he was an at-will employee, who could be fired without cause.[10] There can be no expectation of reemployment or property interest arising from his initial hiring, when that hiring itself created no property interest.[11] See Altieri v. Penn. State Police, No., 2000 WL 427272. at *10 (E.D. Pa., April 20, 2000) (holding that a statute, requiring new police officers to serve an eighteen-month probationary period, creates no property interest in the position and equating the probationary period to the interview process). To the extent that Mr. Smith claims that there needs to be a procedure to prevent discrimination in hiring practices, that procedure already exists through the administrative and judicial procedures of Title VII, of which Mr. Smith is already acquainted.

5. Punitive Damages

Finally, summary judgment must be granted in favor of Defendant Orange County on Mr. Smith's claim for punitive damages because punitive damages are unavailable against the School Board as a government entity under both § 1983, City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981), and Title VII, Brantley v. City of Macon, 390 F. Supp. 2d 1314, 1332 (M.D. Ga. 2005) (quoting Scott v. Estes, 60 F. Supp. 2d 1260, 1274 (M.D. Ala. 1999) and 42 U.S.C. § 1981a(b)(1)).

III. Conclusion

In accordance with the foregoing, it is **ORDERED** and **ADJUDGED** as follows:

1. The Motion for Summary Judgment (Doc. 98) filed by Defendant Orange County School Board is **GRANTED**.

2. All other pending motions are **DENIED as moot**.

3. The Clerk is directed to enter a judgment in favor of Defendant Orange County School Board

in accordance with this Order. Thereafter, the Clerk shall close this file.

DONE and **ORDERED** in Chambers, Orlando, Florida this 2/ day of November, 2006.

S/ JOHN ANTOON II
United States District Judge

Copies furnished to:
Counsel of Record
Unrepresented Party

[1] Although Mr. Smith is proceeding pro se, he has had sporadic legal assistance in this case because he referred to attorney's fees when calculating his costs during his deposition, wherein he stated that he has made payments to at least eight attorneys. (Dep. of PL., Doc. 99, at 179:17-24; see also Doc. 69) (discussing Mr. Smith's erratic use of legal assistance and his attempts to undermine the work of at least one of his attorneys, Mr. Colleton.) In addition, Mr. Smith was notified of his obligations regarding summary judgments in the Case Management Report. (Doc. 17.) Specifically, the report states that any party opposing a summary judgment has 30 days in which to file a legal memorandum in opposition and that summary judgments are taken under advisements 30 days from when it is served. (Id.)

[2] The basis for Mr. Smith's 2000 termination is not an issue in this case. Here, Mr. Smith has claimed and can only claim discrimination and retaliation regarding his failure to be rehired after that initial termination and in his difficulty in finding a teaching job in other school systems.

[3] Mr. Smith's § 1981 claim appears to be based on the injury to his reputation as a result of not being rehired by the School Board. In effect, Mr. Smith argues retaliation by failing to act.

He claims that the Board allowed the public to believe he was terminated for cause, that parents inquired of him as to whether he was terminated for sexual misconduct, that fil ng the school's policy regarding physical, emotional, or sexual abuse of students in response to the EEOC's inquiry led the EEOC to mistakenly conclude that he was terminated for sexual misconduct, and that Orange County has refused to identify the details of his termination when asked by other school systems, which has allowed those "prospective employers to think the worst." (PL's Compl. ¶¶ 22-25.) Most of his claims, therefore, are not necessarily that the Board retaliated against him by defaming him to other potential employers, but that the Board allowed others to believe something that was untrue. This is insufficient to mark a deprivation of any right or interest under § 1983, the mechanism of reaching a state actor under § 1981. See infra n.5; see generally Paul v. Davis, 424 U.S. 693, 701 (1976).

[4] Plaintiff inadvertently numbered two of his Complaint's counts as Count Three. Thus, "Count Three" marks his claims for both race discrimination under Title VII and retaliation under § 1981 related to his reputation as a teacher.

[5] Although § 1981 does not provide a private cause of action against state actors, when not brought in conjunction with §

1983. see Butts v. County of Volusia, 222 F.3d 891, 892 (11th Cir. 2000); see also Palmer v. Stewart County Sch. Dist., 178 Fed. Appx. 999, 1002 (11th Cir. 2006); Asad v. Crosby, 170 Fed. Appx. 668, 673 (11th Cir. 2006), the Court grants Mr. Smith, proceeding pro se, the benefit of the doubt that he has stated a claim under § 1983 to enforce his § 1981 rights. Despite the assumption that he has stated a proper claim, Mr. Smith cannot survive summary judgment under the Title VII framework.

[6] The Court's "sole concern is whether unlawful discriminatory animus motivated the challenged employment decision, not whether the employment decisions were prudent or fair... it does not matter whether the plaintiff is actually innocent of the infraction for which she was fired; the only relevant inquiry is whether the employer believes she is guilty." Miller v. Potter, No. 05-15897, slip op., 2006 WL 2167898, at *3 (11th Cir. 2006) (citing Damon v. Fleming Supermarkets of Fla., Inc., 196F.3d 1354, 1361, 1363 n.3 (11th Cir. 1999)).

[7] As mentioned above, § 1983 is the mechanism for reaching a state actor's conduct. Section 1981, however, "prohibits discrimination based on race in the making and enforcement of contracts and extends to private as well as state actors in

that regard" Anderson v. Convoy, 156 F.3d 167, 170 (2d Cir. 1998) (citing Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 459 (1975)). Section 1981 was passed pursuant to the Thirteenth Amendment, id. at 172, thus, the Court gleans from the First Amended Complaint that this is the basis of the claim Mr. Smith has made.

[8] If Mr. Smith argues that the School Board itself held the retaliatory motive, an official policy need not be proved, see Tucker v. Talladega City Schs., 171 Fed. Appx. 289, 297-98, 300 (11th Cir. 2006), and it is appropriate to proceed through the traditional retaliatory analysis.

[9] Mr. Smith has also filed and withdrawn numerous motions to compel in response to Defendant Orange County's objections to his propounded discovery. Though Mr. Smith has sought much information regarding his 2000 termination, that termination and its basis is not the subject of this case. (See Order Denying Motions to Compel, Doc. 96, at 6.) Rather, Mr. Smith has alleged that his claim is founded on his failing to be rehired - the 2000 termination is irrelevant to the matter at hand.

[10] To the extent that Mr. Smith seeks to resurrect his lost claims relating to his 2000 termination, the School Board points out that Mr. Smith was provided a procedural

opportunity to protest that termination at the School Board's meeting, but that Mr. Smith did not take advantage of that opportunity.

[11] In his deposition, Mr. Smith claims that the stated policy of not rehiring those terminated during the probationary period is "in violation of several Florida state statutes." (Smith Dep. 92:4-93:25.) He has failed to identify which Florida Statutes he refers to and this Court can find no state statute which would confer a property interest in prospective employment on him.